UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CLIFTON W. MARSHALL, et al.,

Plaintiffs,

v.

NORTHROP GRUMMAN CORP., et al.,

Defendants.

Case No. CV 16-06794-AB (JCx)

~~[PROPOSED]~~ ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. INTRODUCTION

Pending before the Court is Plaintiffs Clifton W. Marshall, Thomas W. Hall, Manuel A. Gonzalez, Ricky L. Hendrickson, Phillip B. Brooks, and Harold Hylton's Motion for Class Certification. (Dkt. No. 83.) Defendants filed an opposition, (Dkt. No. 115), and Plaintiffs replied, (Dkt. No. 121). The Court heard oral argument on the Motion on October 27, 2017, and took the matter under submission. (Dkt. No. 129.) Having considered the arguments advanced by both sides, and for the reasons indicated below, the Court **GRANTS** Plaintiffs' Motion.

II. BACKGROUND

A. Procedural Background

On September 9, 2016, Clifton W. Marshall, Thomas W. Hall, Manuel A. Gonzalez, Ricky L. Hendrickson, Phillip B. Brooks, and Harold Hylton (collectively, "Plaintiffs") filed a putative class action against Northrop Grumman Corporation ("Northrop"), the Northrop Grumman Corporation Savings Plan Administrative Committee ("Administrative Committee"), the Northrop Grumman Corporation Savings Plan Investment Committee ("Investment Committee"), Denise Peppard, Northrop's corporate vice president and chief human resources and administrative officer; Ian Ziskin, chair of the Administrative Committee, corporate vice president, and chief human resources and administrative officer until April 2010; Michael Hardesty, Northrop's corporate vice president and controller; Kenneth L. Bedingfield, corporate vice president and controller from 2011–2013; Kenneth N. Heintz, corporate vice president and controller from 2009–2011; Talha A. Zobair, Northrop's vice president taxation since 2014; Prabu Natarajan, vice president taxation from 2011–2014; Daniel Hickey, vice president compensation benefits from 2013–2016; Maria T. Norman, Northrop's corporate director benefits administration and services; Stephen C. Movius, Northrop's corporate vice president and treasurer; Mark A. Caylor, corporate vice president and treasurer from 2011–2012; Mark Rabinowitz, corporate vice president and treasurer from 2009–2011; and, Silva Thomas, Northrop's corporate director investments and compliance. (Dkt. No. 1 ¶¶ 17–45.)

On January 20, 2017, the Court granted in part and denied in part Defendants' Motion to Dismiss. (Dkt. No. 67.) The Court allowed Plaintiffs leave to amend the putative class period to comport with the statute of limitations, allegations involving Financial Engines and the Emerging Markets Equity Fund in order to establish standing, and allegations regarding the extent of Northrop's role as a fiduciary. (*See* Dkt. No. 68.) Plaintiffs subsequently filed a First Amended Complaint on February

13, 2017. (Dkt. No. 70 ("Compl.").)

The instant Motion followed on May 15, 2017. (Dkt. No. 83 ("Mot.").) Plaintiffs seek to represent a class of "[a]ll persons, excluding defendants and/or other individuals who are liable for the conduct described in the complaint, who are or were participants or beneficiaries of the Northrop Grumman Savings Plan at any time between September 9, 2010 and the date of judgment, and were affected by the conduct set forth in this complaint, as well as those who will become participants or beneficiaries of the Northrop Grumman Savings Plan." (Compl. ¶ 100.) Defendants oppose the Motion. (Dkt. No. 115 ("Opp'n").)

B. Allegations in the First Amended Complaint

The Northrop Grumman Savings Plan ("Plan" or "NGSP") is an employee pension benefit plan in which participants invest their individual accounts in a variety of investment options controlled by Plan fiduciaries. (Compl. at ¶ 7.) "Under the Plan, participants are responsible for investing their individual accounts and will receive in retirement only the current value of that account." (*Id.*) The Northrop Grumman Defined Contribution Master Trust holds the assets of the Plan in accordance with the terms of a written trust agreement. (*Id.* at ¶ 9.) Northrop's Board of Directors appoints the Trustee of the Master Trust, and the Plan's fiduciaries have full authority over the Trustee as to the disposition of Plan assets. (*Id.*)

The document governing the Plan designates two committees—an "Administrative Committee" and an "Investment Committee"—which, along with their members, are administrators and named fiduciaries of the Plan.[1] (Compl. ¶¶ 19, 23.) Each committee is comprised of three members, to be appointed by Northrop's Board of Directors.[2] (*Id.* at ¶¶ 20, 24.) The Board designates certain executives, by virtue of

[1] The Investment Committee and its members are fiduciaries of the Plan for investment matters, and the Administrative Committee and its members are fiduciaries of the Plan for all other purposes. (Compl. ¶¶ 19, 23.)

their positions, to sit on these committees regardless of their qualifications or suitability to be an ERISA fiduciary. (*Id.* at ¶¶ 21, 25.) These Committees and their members, along with Northrop, are Defendants in this action. (*See id.* at ¶¶ 27–50.)

Administrative Services Agreements ("ASAs"), entered into by Northrop and the Committees, govern which of Northrop's departments provide administrative and investment services to the Plan. (*Id.* at ¶ 52.) The ASAs authorized only Benefits Administration and Services, Benefits Accounting and Analysis, Benefits Compliance, and Investment and Trust Management departments to be reimbursed for services they provided on behalf of Northrop to the plan. (*Id.* at ¶ 53.) The Committees were tasked with approving each of the departments' reimbursements and ensuring all charges to the Plan were authorized by the ASAs.[3] (*Id.* at ¶¶ 54, 55.)

According to Plaintiffs, the Committees failed to comply with the terms of the ASAs, violating their "fiduciary duty to operate the plan solely in the interest of the plan participants" by "allow[ing] the heads of the very departments that were to be paid from Plan assets the authority to authorize payment of Plan assets to those departments." (*Id.* ¶ 56.) "In other words, Northrop effectively exercised unfettered control over its payment from Plan assets, including payments to departments not authorized by the ASAs and payments for services that were not authorized by the ASAs or authorized under ERISA." (*Id.*) These departments maximized the expenses charged to the Plan with no regard as to whether those expenses were reasonable, necessary, competitive, or in the exclusive interest of Plan participants. (*Id.* at ¶¶ 57–59.)

According to Plaintiffs, the Plan also paid unreasonable recordkeeping fees to its

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[2] The Compensation Committee of the Board of Directors appoints individuals to the Administrative Committee, and since 2011, Northrop's CEO appoints individuals to the Investment Committee. (Compl. ¶¶ 20, 24.)

[3] The ASAs required the Investment Committee to approve expenses of the Investments and Trust Management Department, and the Administrative Committee was required to approve reimbursements from all other authorized departments. (Compl. ¶¶ 53, 54.)

recordkeeper, a fault attributable to Defendants. (*Id.* at ¶ 72.) From January 1, 2007, to April 1, 2016, Hewitt Associates LLC ("Hewitt") served as the Plan's recordkeeper. (*Id.* at ¶ 64.) From at least 2010 to 2016, Hewitt was compensated for its services at a fixed rate of $500,000 per month in addition to transaction-specific payments.[4] (*Id.* at ¶ 69.) In addition to its set monthly rate plus a per-participant rate per year, Hewitt allegedly received payments from Financial Engines, a provider of investment advice to individual Plan participants who opt in to paying for this service. (*Id.*at ¶ 70.) According to Plaintiffs, Financial Engine pays Hewitt a portion of the fees Plan participants pay for Financial Engine's advice for nothing in return. (*Id.*) This "kickback" suggests, in Plaintiffs' view, Defendants paid Financial Engines excessive fees for the services provided to participants, and furthermore, that Defendants "failed to properly monitor Hewitt's total compensation from all sources in light of the services Hewitt provided and thus caused the Plan to pay unreasonable administrative expenses to Hewitt." (*Id.* at ¶¶ 70–72.)

Plaintiffs further allege despite a 23% decrease in the number of Plan participants from 2009 to 2015, Hewitt's per-participant compensation was not likewise reduced, which effectively caused "Hewitt's total recordkeeping compensation to increase over 54% on a per-participant basis to $73 per participant per year, even though Hewitt's recordkeeping services remained the same or declined." (*Id.* at ¶ 73.) Plaintiffs allege that from Financial Engines, in particular, Hewitt's compensation increased from $258,120 to over $2.3 million in a two-year period. (*Id.* at ¶ 74.) And in general, the Plan's payments to Hewitt from 2010 to 2015 for recordkeeping services were unreasonably high, ranging from $5.9-7.5 million. Plaintiffs contend these figures are significantly higher than the $2.5–$3.3 million dollar range that they allege is the "outside limit of a reasonable recordkeeping fee" in light of "the nature of the

[4] Plaintiffs calculate this set rate on a per participant basis, alleging Hewitt was compensated $37-$39.47 per participant per year. (Compl. ¶ 69.)

administrative services provided by Hewitt, the Plan's number of participants (100,000-130,000), and the recordkeeping market." (*Id.* at ¶¶ 75, 76.) Plaintiffs allege Defendants failed to gauge the reasonableness of Hewitt's fees against an independent third party since 2007, and since 2010, Defendants failed to seek competitive bids for the recordkeeping it required. (*Id.* at ¶¶ 77, 78.)

Plaintiffs also allege Defendants mismanaged the Emerging Markets Equity Fund since at least 2010. The Emerging Markets Fund was a Plan investment option that invested in securities issued by developing countries. (*Id.* at ¶ 80.) Plaintiffs allege the Fund consistently underperformed its benchmark since 2010, and Defendants failed to determine whether maintaining a strategy of active management continued to be in the best interests of Plan participants. (*Id.* at ¶¶ 87–89.) Plaintiffs contend Defendants' failure to more prudently manage the fund earlier cost Plan participants $30 million in performance losses and $12 million in unreasonable investment management fees. (*Id.* at ¶¶ 90–91.)

III. LEGAL STANDARD

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits, and (2) to protect the rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)). A district court may certify a class only if

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). In addition a district court must also find that at least one of the following three conditions is satisfied:

> (1) the prosecution of separate actions would create a risk of: (a) inconsistent or varying adjudications, or (b) individual adjudications dispositive of the interests of other members not a party to those adjudications; (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class; or (3) questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 580 (9th Cir. 2010) (en banc), cert. granted, 131 S. Ct. 795 (Dec. 6, 2010). "The party seeking certification bears the burden of showing that each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b) have been met." *Id.* (citing *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir.), amended by 273 F.3d 1266 (9th Cir. 2001)).

In deciding whether to certify a class under Rule 23, an inquiry regarding the merits of the claims is generally inappropriate. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974); *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1232 (9th Cir. 1996). Nonetheless, the court may find it necessary to look beyond the pleadings and examine plaintiffs' substantive claims to determine whether the elements of Rule 23 have been met. *See Dukes*, 603 F.3d at 581 ("When considering class certification under Rule 23, district courts are not only at liberty to, but must, perform a rigorous analysis to ensure that the prerequisites of Rule 23(a) have been satisfied." (citing *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160–61 (1982))); *see*

also Coopers & Lybrand v. Livesay, 437 U.S. 463, 469 (1978) (determining whether to certify a class "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action"); *In re Unioil Secs. Litig.*, 107 F.R.D. 615, 618 (C.D. Cal. 1985) ("[N]otwithstanding its obligation to take the allegations in the complaint as true, the Court is at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case.").

As the Ninth Circuit has emphasized, this "does not mean that a district court must conduct a full-blown trial on the merits prior to certification." *Dukes*, 603 F.3d at 581. Nonetheless, "[a] district court's analysis will often, though not always, require looking behind the pleadings, even to issues overlapping with the merits of the underlying claims," since "district courts [must] ensure that Rule 23 requirements are actually met, not simply presumed from the pleadings." *Id.* at 581–82.

IV. DISCUSSION

The Court considers each requirement in turn.

A. Standing

As a preliminary matter, the Court addresses Defendants' argument that Plaintiffs' proposed class cannot be certified for lack of standing. (Opp. at 4.) This Court previously addressed the standing issue when it granted in part and denied in part Defendants' motion to dismiss. (Dkt. No. 68 at 14.) In that Order, the Court found that Plaintiffs had not adequately alleged Article III standing as to the Emerging Markets Equity Fund and Financial Engines account. (*Id.* at 15–17.) However, in response to the Court's Order, Plaintiffs' FAC alleges that Plaintiffs Brooks and Hall invested in the Emerging Markets Equity Fund and were harmed by Defendants' management decisions, (FAC ¶ 6(d)), and that Plaintiff Brooks "used the Financial Engines managed account services and thus directly paid a portion of the Financial Engines' fees that were shared with Hewitt," (*id.*at ¶ 6(c)).

However, Plaintiffs must satisfy a different standard at class certification than the one they had to meet on a motion to dismiss. *See Dukes*, 564 U.S. at 350 ("Rule 23 does not set forth a mere pleading standard."); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (stating that each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation"). At class certification, Plaintiffs must show standing "through evidentiary proof." *Moore v. Apple Inc.*, 309 F.R.D. 532, 538 (N.D. Cal. 2015) (quoting *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013)).

The elements of standing are (1) the plaintiff suffered an injury in fact that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical"; (2) the injury is "fairly traceable" to the challenged conduct; and (3) the injury is "likely" to be "redressed by a favorable decision." *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) (quoting *Lujan*, 504 U.S. at 560–61). Here, Plaintiffs have produced sufficient evidence to establish Article III standing. Plaintiffs' exhibits contain evidence that Plaintiff Hall invested in the Emerging Markets Equity Fund from 2009 until March 2016. (Dkt. No. 64-4 ¶ 4.) Thus, Plaintiffs argue that his account "necessarily suffered a proportionate share of the Plan's net loss" between December 2010 and November 2014. (Opp'n at 1; *see* Dkt. No. 121-1, Declaration of Sean E. Soyars ("Soyars Decl.") at Exs. 1, 2, 3.) Additionally, Mr. Hall testified at his deposition that he invested in funds listed on a March 21, 2016 statement, which included the Emerging Markets Equity Fund. (Opp'n at 2; Dkt. No. 115-8 at 10.) Further, Plaintiff Brooks testified that, although he did not understand many of the details surrounding the plans, he used the Financial Engines service. (*See* Dkt. No. 115-4.)

Accordingly, the Court finds Plaintiffs have adequately established Article III standing through evidence that shows named representatives Brooks and Hall were

participants in the Emerging Markets Fund and the Financial Engines account. *See also Bates*, 511 F.3d at 985 ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."); *Urakhchin v. Allianz Asset Mgmt. of America, LP*, No. 8:15-cv-1614-JLS-JCGx, 2017 WL 2655678, at * 8 (C.D. Cal. June 15, 2017) ("Moreover, district courts in California routinely hold that the issue of whether a class representative may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation."

B. Numerosity

Federal Rule of Civil Procedure ("Rule") 23(a) requires the Court to determine that the class is "so numerous that joinder of all members is impracticable." "Impracticability does not mean impossibility," however; only "difficulty or inconvenience in joining all members of the class" is required. *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964). There is no set numerical cutoff used to determine whether a class is sufficiently numerous; courts must examine the specific facts of each case in evaluating whether the requirement has been satisfied. *See General Tel. Co. v. EEOC*, 446 U.S. 318, 329-30 (1980). "As a general rule," however, "classes of 20 are too small, classes of 20–40 may or may not be big enough depending on the circumstances of each case, and classes of 40 or more are numerous enough." *Ikonen v. Hartz Mountain Corp.*, 122 F.R.D. 258, 262 (S.D. Cal. 1988). Plaintiffs have proffered evidence that since September 9, 2010, there have been at least 100,000 active participants in the Plan. (*See* Dkt. No. 83-3.) Defendants do not appear to dispute that Plaintiffs have satisfied the numerosity requirement. The Court thus concludes that this requirement for certification is met.

C. Commonality

Commonality requires "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality requirement is liberally construed, and the

existence of some common legal and factual issues is sufficient to satisfy the requirement. *See Dukes*, 603 F.3d at 599 ("The commonality test is 'qualitative rather than quantitative'—one significant issue common to the class may be sufficient to warrant certification."); *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1320 (9th Cir. 1982); *accord Hanlon v. Chrysler Corp*., 150 F.3d 1011, 1019 (9th Cir. 1998) ("The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively."). As the Ninth Circuit has noted: "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon*, 150 F.3d at 1019.

Plaintiffs argue that "there are numerous common questions on which all class members' claims depend, including: whether Defendant is a fiduciary; the extent and nature of the duties Defendants owed to the Plan; whether each Defendant breached his or her fiduciary duty or engaged in a prohibited transaction in each respect alleged by Plaintiffs; whether the Plan suffered losses from these breaches; how to calculate the Plan's losses; and what equitable relief should be imposed to remedy such breaches and prohibited transactions and to prevent future ERISA violations." (Mot. at 9.) Because the "evidence required to answer these contentions are Plan-level facts", it is the same for all Plan participants. (*Id.*)

Defendants contend that Plaintiffs have not established commonality as to their recordkeeping claim. (Opp'n at 9.) Defendants assert that it is impossible to determine whether this claim is common among all members of the class because Plaintiffs do not allege the "tipping point" at which the fees paid for recordkeeping became unreasonable. (*Id.*) However, seeing as recovery is sought for losses to *the Plan*, the question of when the fees became unreasonable *is* a common question. There will be only one answer because the relevant consideration is the effect of

Defendants' conduct on the Plan as a whole. *See Tussey v. ABB, Inc.*, No. 06-04305-CV-NKL, 2007 WL 4289694, at *5 (W.D. Mo. 2007) (finding commonality in an ERISA breach of fiduciary duty case where "the common focus is on the conduct of the Defendants").

Defendants also suggest that commonality cannot be established because various Defendants served as fiduciaries under the Plan at different times, and the class members were not all participants in the Plan at the same time or for the same duration. (Opp'n at 11.) However, again, differences in participation by the class members does not defeat the fact that common questions exist as to their claims. The question of whether Defendants breached their fiduciary duties to the Plan are common to all Plan participants' claims and will generate answers common to all of the putative class members. *See Kanawi v. Bechtel Corp.*, 254 F.R.D. 102, 110 (N.D. Cal. 2008); *Krueger v. Ameriprise Fin. Inc.*, 304 F.R.D. 559, 572 (D. Minn. 2014).

Because Plaintiffs have identified multiple questions of fact and law that are common to all Plan participants and beneficiaries, the Court concludes that they have satisfied the "permissive" commonality requirement of Rule 23(a)(2).

D. Typicality

Typicality requires a determination as to whether the named Plaintiffs' claims are typical of those of the class members they seek to represent. *See* Fed. R. Civ P. 23(a)(3). "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020; *Schwartz v. Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985) ("A plaintiff's claim meets this requirement if it arises from the same event or course of conduct that gives rise to claims of other class members and the claims are based on the same legal theory."); *see also Dukes*, 603 F.3d at 613 ("Thus, we must consider whether the injury allegedly suffered by the named plaintiffs and the rest of the class resulted from the same allegedly [harmful] practice.").

"The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct [that] is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon*, 976 F.2d at 508. Typicality, like commonality, is a "permissive standard." *Id.* at 1020. Indeed, in practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *Falcon*, 457 U.S. at 157 n. 13. Typicality may be found lacking, however, "if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to [him].'" *Hanon*, 976 F.2d at 508 (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 180 (2d Cir. 1990)); *see also J.H. Cohn & Co. v. Am. Appraisal Assoc., Inc.*, 628 F.2d 994, 999 (7th Cir. 1980) ("[E]ven an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation.").

Defendants contend that the named Plaintiffs' claims are not typical of the class because the named Plaintiffs "consistently profess[] their ignorance of the [*Grabek*] litigation," yet the class includes numerous individuals who were class members in *Grabek*, the related case—*In re Northrop Grumman Corp. ERISA Litig.*, No. 06-6213 (C.D. Cal.) (the "*Grabek*" litigation)—and "have acquired actual knowledge of the reimbursement allegations." (Opp'n at 13.) Defendants claim that these class members' claims are time barred. (*Id.*) However, this Court has already informed Defendants that they must support their statute of limitations theory with specific facts particular to each claim. (*See* Dkt. No. 68 at 11.) Defendants merely conclude that common sense dictates that these class members would have received actual knowledge of the allegations in *Grabek* through briefings, media, or personal involvement in the case. (Opp'n at 13.) However, Defendants do not identify any specific class members who claim to have actual knowledge, read the briefs in *Grabek*,

read news reports, or were personally involved in the *Grabek* class. Accordingly, Defendants' arguments are unpersuasive.

Plaintiffs assert that the class representatives claims are typical of the class because "the claims of the named Plaintiffs and all class member arise from the same events and course of conduct, because Defendants' actions were directed to and affected the Plan as a whole." (Mot. at 11.) "Each class member would have to rely on the same evidence to provide Defendants breached their duties, committed prohibited transactions, and harmed the Plan." (*Id.*) Given that the focus in ERISA fiduciary breach cases is on the Defendants' conduct, and that the First Amended Complaint specifically alleges plan-wide fiduciary breaches and prohibited transactions, the Court finds the typicality requirement satisfied. *See In re First American Corp. Erisa Litigation*, 258 F.R.D. 610, 619 (C.D. Cal. 2009) ("If the Plan Participants' claim is successful, all class members suffered the same injury through the same course of conduct. None of the facts or legal claims are unique to the named plaintiffs. This action is brought on behalf of the Plan as a whole, not individual claimants. If recovery is received and paid to the Plan, it is the responsibility of the Plan fiduciaries to determine the manner in which such recovery will be applied. Accordingly, the typicality requirement is satisfied."); *Tibble v. Edison Int'l*, No. CV 07-5359 SVW (AGRx), 2009 WL 6764541, at *4 (C.D. Cal. June 30, 2009) ("Defendants do not challenge whether the claims of the individual plaintiffs are typical to the class. Perhaps this is because Defendants recognize that actions brought under § 502(a)(2) for breach of fiduciary duty are for the benefit of the plan as a whole. Section 1109(a) states that any fiduciary who breaches one of the duties outlined in the statute 'shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary.' Thus, as participants, the named plaintiffs'

claims are typical to those of other members of the Plan.").

Footnote 14 in Defendants' Opposition seeks to incorporate by reference any arguments made by Defendants in their opposition to the motion for class certification in *Grabek*. (Opp'n at 12 n.14.) The Court is familiar with that order and agrees with the analysis therein. The Court incorporates the reasoning set forth by Judge Morrow in that order in rejecting these arguments.

E. Adequacy

The adequacy of representation requirement set forth in Rule 23(a)(4) involves a two-part inquiry: "(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Hanlon*, 150 F.3d at 1020; *accord Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003). "Some courts have denied class certification when 'the class representatives had so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interest of the class against the possibly competing interest of the attorneys.'" *In re Wash. Mut., Inc. Sec., Derivative, & ERISA Litig.*, Nos. 2:08-md-1919, 15 C08-387, 2001 WL 4272567, *5-6 (W.D. Wash. Oct. 12, 2010) (quoting *Buus v. WaMu Pension Plan*, 251 F.R.D. 578, 587 (W.D. Wash. 2008)). Courts are reluctant, however, to deny class certification on the basis that the class representatives lack sophistication. *See, e.g., Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 376 (1966) (affirming class certification where the named plaintiff knew nothing about the content of the suit but knew she was not getting her stock dividends); *Buus*, 251 F.R.D. at 587 (finding a class representative adequate who knew that the litigation concerned changes to her employer's retirement plan but did not know whether she participated in one of two plan at issue or whether she had received a distribution from one of the plans).

Defendants argue that five of the Plaintiffs signed agreements "voluntarily

releasing their claims against Northrop in exchange for severance benefits" and thus are "atypical of the plan participants they seek to represent." (Opp'n at 14.) However, Defendants acknowledge that there is a split in authority with regard to whether a participant can waive breach of fiduciary duty claims. (*Id.*) The Ninth Circuit has held that a participant in a defined-benefit plan may not release a claim for breach of fiduciary duty without the consent of her plan. *Bowles v. Reade*, 198 F.3d 752 (9th Cir. 1999). Courts in this circuit have applied *Bowles* to defined-contribution plans such as the one here. *See Cryer v. Franklin Templeton Res., Inc.*, No. C 16-4265 CW, 2017 WL 818788, at *3 (N.D. Cal. Jan. 17, 2017); *In re JDS Uniphase Corp. ERISA Litig.*, 2007 WL 1217400, at *1 (N.D. Cal. Apr. 24, 2007). Further, in *Bowles*, the distinction between "defined-benefit" and "defined-contribution" plans does not appear to be the crux of the court's decision; instead, the court focuses on the fact that the claim was brought on behalf of the plan. *See Bowles*, 198 F.3d at 760; *see also* 29 U.S.C. § 1332(a)(2). Since Plaintiffs' claims are similarly brought on behalf of the Plan, the Court concludes, as have other courts in this circuit, that Plaintiffs could not release them without the Plan's consent. *See Bowles*, 198 F.3d at 760; *Cryer*, 2017 WL 818788, at *3. Thus, the fact that Plaintiffs signed waivers for their individual claims does not defeat adequacy.

Defendants next argue that the two of the named Plaintiffs are atypical of the class because they "withdrew all the money from their accounts and are no longer Plan participants." (Opp'n at 17.) As to this argument, the Court notes that in *Harris v. Amgen, Inc.*, 573 F.3d 728 (9th Cir. 2009), the Ninth Circuit held that an employee who has cashed out has statutory standing to assert fiduciary duty claims under § 502(a)(2). This is contrary to the holding in the case cited by Defendants, *DeFazio v. Hollister, Inc.*, 636 F. Supp. 2d 1045 (E.D. Cal. 2009). *See also Cryer v. Franklin Templeton Res. Inc.*, 2017 U.S. Dist. LEXIS 150683, at * 10–11 (N.D. Cal. 2017).

However, Defendants apparently concede that these Plaintiffs "would be entitled

to participate in any class-wide recovery that pertains to the period they were participants in the Plan." (*Id.*) Any argument that these Plaintiffs' interests are different because they have cashed out is unavailing. Their "interest" is to restore the to the Plan any funds improperly taken by Defendants. Any specific recovery each will receive does not change the overall interest which is the same for all class members. *See Kanawi*, 254 F.R.D. at 110 ("Although the losses attributable could differ from participant to participant, individual damages should not defeat typicality."). This is particularly true since, as numerous courts in this circuit have noted, "[t]h[e] action is brought on behalf of the Plan as a whole, not individual claimants. If recovery is received and paid to the Plan, it is the responsibility of the Plan fiduciaries to determine the manner in which such recovery will be applied." *In re First American Corp.*, 258 F.R.D. at 619. Accordingly, the Court concludes that the Plaintiffs that have withdrawn from the Plan are still participants and are not atypical of the class in that way.

Finally, Defendants argue that the named Plaintiffs "exceptional ignorance of their claims proves them inadequate representatives of a class." (Opp'n at 18.) Defendants contend that "the deposition testimony of these Plaintiffs leaves no doubt that Plaintiffs lack sufficient knowledge and engagement to advocate for the interests of the class they seek to represent." (*Id.*) Mr. Brooks, for example, testified that he did not know whether he had invested in the Emerging Markets Fund, or whether he paid fees for using the Financial Engines service. (*Id.* at 19.) Mr. Hylton also testified that he could not explain the status of the lawsuit, or whether Northrop provided services to the Plan. (*Id.*) Thus, Defendant concludes, the Plaintiffs are "true stand-in parties, selected by lawyers to fill a required role." (*Id.* at 20.)

A review of the deposition testimony of these Plaintiffs shows that each is aware they assert that Defendants' conduct caused them to pay excessive fees and caused the plans that they participated in to lose money. (*See* Dkt. 83-6 ("Gonzalez

Depo") at 13, 37; Dkt. No. 83-7 ("Marshall Depo") at 8, 9; Dkt. No. 83-8 ("Hendrickson Depo") at 37, 38; Dkt. No. 83-9 ("Brooks Depo") at 38, 39; Dkt. No. 83-10 ("Hylton Depo") at 16, 17.) That is sufficient for purposes of adequacy under Rule 23(a)(4), particularly in a legally complex case such as this one. *See e.g.*, *Kanawi*, 254 F.R.D. at 111 ("[E]ven if Plaintiffs did not have reason to suspect that there were problems with the Plan before contacting counsel, that is simply the nature of a claim of this type. The average person would have no reason to believe that the administrator of his 401(k) plan was acting imprudently."); *Rankin v. Rots*, 220 F.R.D. 511, 520-21 (E.D. Mich. 2004) ("Defendants do not dispute the qualifications of [plaintiff's] counsel, but rather argue that [plaintiff] herself is not an adequate representative because she admitted at deposition to having essentially no knowledge of ERISA, the role of the defendants, or the underlying facts of the case. However . . . a careful review of [plaintiff's] excerpted deposition testimony shows that she understands that she had a retirement plan and believes that defendants failed to protect the money in the Plan. She also understands her obligation to assist her attorneys and testify. This is sufficient.").

Further, the class representatives actively participated in discovery, met with counsel, sat for deposition, and monitor the proceedings in this case. (Reply at 13; *see also* Soyars Decl. ¶¶ 6–11, Exs. 5–10.) Accordingly, the Court finds that Plaintiffs have satisfied the adequacy of representation requirement set forth in Rule 23(a)(3).

F. Rule 23(b)(1)

"The party seeking certification bears the burden of showing that . . . at least one requirement of Rule 23(b) ha[s] been met. *Dukes*, 603 F.3d at 580. Plaintiffs seek to certify the class under Rule 23(b)(1), and in the alternative, under Rule 23(b)(3). (Mot. at 15.) Rule 23(b)(1) authorizes class certification where

> "prosecuting separate actions by or against individual class members would create a risk of: (A) inconsistent or varying

> adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests."

"Rule 23(b)(1)(A) considers possible prejudice to a defendant, whereas Rule 23(b)(1)(B) looks to prejudice to the putative class members." *Kanawi*, 254 F.R.D. at 111.

"Most ERISA class action cases are certified under Rule 23(b)(1)." *Id.* As numerous courts have noted, "[a] classic example of a Rule 23(b)(1)(B) action is one which charges 'a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of beneficiaries, requiring an accounting or similar procedure to restore the subject of the trust.'" *Gomez v. Rossi Concrete, Inc.*, 270 F.R.D. 579, 593 (S.D. Cal. 2010) (citing *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (noting that a classic example of adjudications that would be dispositive of the interests of the other members not parties to the individual adjudications would be "actions charging 'a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class' of beneficiaries, requiring an accounting or similar procedure 'to restore the subject of the trust")); *see also e.g.*, *Tibble*, 2009 WL 6764541 at *7 (noting that ERISA fiduciary actions present a paradigmatic example of a (b)(1) class).

Plaintiffs seek certification under Rule 23(b)(1) of claims alleging that Defendants breached their fiduciary duties under § 502(a)(2) and (3) of ERISA. Under those provisions, any relief benefits the plan as a whole, not individual

plaintiffs. *See Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 141–44 (1985) ("A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary."). Because the issue is the *Plan's* damages, the determination must be the same for every participant and beneficiary, and forcing the class members to adjudicate individually poses a significant risk of inconsistent judgments. (*See* Mot. at 16; Reply at 14.)

The Court finds Defendants' reliance on *Zinser v. Accufix Research Inst.*, 253 F.3d 1180, 1193 (9th Cir. 2001) unpersuasive. There, the court determined that that Rule 23(b)(1) certification was inappropriate because plaintiffs exclusively sought money damages; here, Plaintiffs also seek substantial equitable remedies for the Plan, including disgorgement and injunctive relief. *See Tibble*, 2009 WL 6764541, at *7–8 (distinguishing *Zinser* and certifying class under Rule 23(b)(1)).

Defendants also argue that the class cannot be certified under Rule 23(b)(1)(B) because following the Supreme Court's decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, 552 U.S. 248 (2008), "there would be no *res judicata* effect against absent participants." (Opp'n at 23.) In *La Rue*, the plaintiff asserted a § 502(a)(2) claim against plan fiduciaries for failing to make certain changes he requested to his individual account. Their failure to make the changes diminished the value of his interest in the plan. The Supreme Court held that "although § 502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participant's individual account." *Id.* at 256.

Defendants assert that this holding—that a participant in a defined contribution plan can bring an individual suit for breach of fiduciary duty—means that putative class members can protect their interests by bringing individual suits, making

certification under Rule 23(b)(1)(B) inappropriate. Although Defendants cite cases from this district that have interpreted *LaRue* this way, a majority of courts addressing the propriety of certifying an ERISA class under § 502(a)(2) following *LaRue* have continued to find Rule 23(b)(1)(B) certification appropriate. *See e.g.*, *In re Northrop Grumman Corp. ERISA Litig.*, No. CV 06–06213 MMM (JCx), 2011 WL 3505264, at * 17 (C.D. Cal. Mar. 29, 2011) (granting class certification in predecessor case under Rule 23(b)(1) upon remand from the Ninth Circuit and noting the Ninth Circuit's observation that the class appeared to meet the requirements of Rule 23(a) and (b)); *Cryer*, 2017 WL 4023149, at *6 (finding certification under Rule 23(b)(1) appropriate because forcing class members to adjudicate claims individually would create a significant risk of inconsistent judgments); *Wit v. United Behavioral Health*, 317 F.R.D. 106 123–33 (N.D. Cal. 2016) ("Certification under Rule 23(b)(1) is particularly appropriate in cases involving ERISA fiduciaries who must apply uniform standards to a large number of beneficiaries."); *Urakhchin*, 2017 WL 2655678, at * 8 ("Defendants argue that because *LaRue* permits Plan participants to bring individual actions to recover losses to their individual accounts, resolving one Plan participant's individual claim would not impede any other Plan participant's individual action. However, just because a Plan participant could bring an individual action under *LaRue* does not mean that resolution of that individual case would not substantially impair or impede the ability of other Plan participants to pursue their own actions. As already noted, Plaintiffs' theory of liability is common to the proposed class and pertains to the manner in which Defendants mismanaged the Plan and breached their fiduciary duties with respect to the Plan as a whole. Given that Defendants' alleged mismanagement of the Plan is the same as to all Plan participants, resolution of one action against one Plan participant would necessarily affect the resolution of any concurrent or future actions by other Plan participants."). Given that Plaintiffs assert § 502(a)(2) and (3) claims on behalf of the Plan and allege breaches of fiduciary duty

by Defendants that will, if proved, affect every Plan participant, the Court concludes that "prosecuting separate actions by or against individual class members would create a risk of . . . adjudications with respect to individual class members that . . . would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests." Rule 23(b)(1). Consequently, the Court finds that Rule 23(b)(1)(B) has been satisfied.

Accordingly, the Court finds class certification proper. However, the Court finds that Plaintiffs' proposed class should be modified in light of their request for injunctive relief. With regard to the future Plan participants, "[t]he Court has the discretion to exclude future class members if there is no need to include them in the class because future members will have the benefit of any injunctive relief awarded." *Kanawi*, 254 F.R.D. at 112 (citing *Selzer v. Board of Educ. of City of New York*, 112 F.R.D. 176 (S.D.N.Y. 1986)). Thus, because the future participants will receive the benefit of any injunctive relief awarded, the Court excludes future participants from the class.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Plaintiffs' Motion for Class Certification. (Dkt. No. 83.) Pursuant to Rules 23(a) and 23(b)(1), it certifies a class of

> All persons, excluding defendants and/or other individuals who are liable for the conduct described in the complaint, who are or were participants or beneficiaries of the Northrop Grumman Savings Plan at any time between September 9, 2010 and the date of judgment, and were affected by the conduct set forth in this complaint.

The Court appoints Schlichter, Bogard & Denton as class counsel. The Court

appoints Marshall, Hall, Gonzalez, Hendrickson, Brooks, and Hylton as class representatives.

IT IS SO ORDERED.

Dated: November 2, 2017

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE